Supreme Court of the United States

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF
NEW YORK

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Supreme Court of the United States

October Term, 1960

No.

In the Matter of the Application of

THE CITY OF NEW YORK, relative to acquiring title to certain real property, where not heretofore acquired, by the City, in the area bounded by Bronx River, East Bay Avenue, Halleck Street and Lafayette Avenue, in the Borough of the Bronx, City of New York, duly selected as a site for the New York City Terminal Market (Hunts Point Area, Bronx).

CITY OF NEW YORK,

Respondent,

against

MOSES DANIEL COHAN, HENRY I. COHAN and ESSIE M. COHAN,

Petitioners-Appellants.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petition

The petitioners, Moses Daniel Cohan, Henry I. Cohan and Essie M. Cohen, respectfully show to this Court and allege:

1. The petitioners are citizens of the United States and at the time of the commencement of this proceeding, were the owners of certain real property in the County of Bronx, State of New York, known as Lot 170, Block 2770 and Lot 232, Block 2773 on the land map of the County of Bronx, State of New York.

2. That the application of The City of New York in the Supreme Court of the State of New York, County of Bronx, was to condemn said real property, take it from the petitioners and lease it out to other private parties under the guise that it was to be operated as a public market for the purpose of selling fresh fruits and vegetables, and the respondent conceded in their printed brief that respondent intended lessees could enjoy therefrom "incidental benefit".

Statement

Respondent, The City of New York, condemned petitioners-appellants' real property known as Lot No. 70, Block 2770 and Lot No. 232, Block 2773 of the Land Map of the City of New York, Borough of Bronx, for the purpose of leasing it to other persons in order that they conduct the business of selling fresh fruits and vegetables for themselves. The appellants appeared in the Supreme Court of the State of New York, Bronx County, and objected to such condemnation of their real property, but their objections were overruled. The appellants thereafter appealed to the Appellate Division of the Supreme Court of the State of New York from said order of condemnation, which, however, denied relief to the appellants; that thereafter the appellants applied to the Court of Appeals of the State of New York, which is the court of last resort in said state, to review said condemnation of appellants' property, but relief was denied on April 20, 1961. A certified copy of the order of the Court of Appeals of the State of New York is annexed thereto.

In opposing the application in the Supreme Court of the State of New York, an affidavit was submitted by Sidney S. Levine, petitioners' attorney, stating in part:

> "Moses Daniel Cohan, Henry I. Cohan and Essie M. Cohan oppose this motion to condemn the property on the ground that it not only is in violation of the Constitution of the State of New York, but of the Constitution of the United States."

That the petitioner, Moses Daniel Cohan, in opposing the application of The City of New York (respondent in said Court) stated in part as follows:

> "The background of this application is that the Washington Market which is owned by private corporations or individuals in lower Manhattan, is to be substituted by a market in Hunts Point, Bronx, New York, to be known as 'Washington Market', however, the City of New York has no right under the Constitution of the State of New York, to condemn real property and then rent it out to private individuals who are to sell fresh fruits and vegetables and in one instance, there is a part of the land to be condemned and rented out as a gas station to a private individual."

No reply affidavits were submitted by The City of New York to the answering affidavit of appellants.

The Supreme Court of the State of New York granted the application of The City of New York by orders dated the 22nd day of June, 1960 and the petitioners' property was thereby seized from them and became the property of The City of New York.

An appeal was taken from said order to the Appellate Division of the Supreme Court. It denied petitioners any relief and dismissed their appeal and thereafter the petitioners applied to the Court of Appeals of the State of New York, which was the court of last resort in that state, and said Court refused to review the orders of the lower Courts in condemning petitioners' property and denied the petitioners' motion for leave to appeal from the orders of the lower Court by its order dated the 20th day of April, 1961, a certified copy of which is hereto annexed and made a part hereof.

While the Court of Appeals of the State of New York and the Appellate Division of the Supreme Court of the State of New York refused to review the order of condemnation which seized the petitioners' property, still

that does not prevent this Court from protecting petitioners when their property had been condemned and seized from them without due process of law, contrary to the 5th and 14th Amendments of the Constitution of the United States.

That petitioners' attorney submitted Federal authorities to show that said condemnation and seizure was in violation of the Constitution of the United States; *Panama Refinery* v. *Ryan*, 293 U. S. 358; *United States* v. *Certain Land*, 78 Federal Report (2d) 684.

The constitutional rights of the petition was stressed by the petitioners' attorney in his brief, wherein he stated on page 17:

> "The principle was forcibly stated in *United States* v. *Certain Land* (*supra*), where the Court citing with approval *Panama Refinery* v. *Ryan* (*supra*), stated:
>
> 'We place our decision upon the second objection to the proceeding, viz., the lack of right in the government to exercise the power of eminent domain for the purposes contemplated by the act.
>
> * * *
>
> "The taking of one citizen's property for the purpose of improving it and selling or leasing it to another, or for the purpose of reducing unemployment, is not" within the scope and power of the government.'"

Thus, there is only one constitutional question involved in this certiorari and that is "Can any city, state or government in the United States condemn and seize an individual's property for the purpose of leasing it to others for profit?" Hereto appended is a Certificate of Merit of Sidney S. Levine, former License Commissioner of the City of New York, and a member of the Bar of this Court, and who is the attorney in this application.

That hereto annexed is petitioners' brief on this application. That submitted in this application is a printed

record of the proceedings in the Courts of the State of New York with the briefs.

WHEREFORE, your petitioners pray this honorable Court that a writ of certiorari be issued therein to the Court of Appeals of the State of New York, to the Appellate Division of the State of New York and to the Supreme Court of the State of New York, Bronx County, that the issues of law herein may be reviewed by this Court.

That no previous application has been made for this or similar relief.

Dated: New York, May 11, 1961.

MOSES DAVID COHAN,
By SIDNEY S. LEVINE,
Attorney for Petitioners.

Argument

Final relief for the petitioners-appellants was denied by the Court of Appeals of the State of New York on the 20th day of April, 1961, which was the court of last resort in that state. The respondent, the City of New York, has seized and condemned petitioners-appellants real property in the State of New York for the purpose of leasing it to other persons on the theory that it was for the purpose of establishing a market for the sale of fresh fruits and vegetables. The lessees of the property to be leased for the city are to enjoy the profits for the conducting of the sale of fresh fruits and vegetables. The petitioners contend that the condemnation of real property for such purpose is in violation of the Constitution of the United States.

The acquisition of appellants' land by the respondent for the purpose of leasing or renting it out to others for the sale of fresh fruit and vegetables is in violation of the appellants' constitutional rights.

It was stated by this court in the case *In re Board of Transportation of New York*, 272 N. Y. 52 by Crane, C.J.

> "There is no constitutional right to appeal in proceedings to take property for public use."

The taking of property of one individual to lease it to another under the guise, that is, to be a public market, is unconstitutional and not for public use as the only profit thereby is the lessee of the property condemned.

The undisputed facts are that the respondent, The City of New York, is desirous of closing Washington Market in lower Manhattan and transferring the market to the Hunts Point section of the Bronx.

The present Washington Market is owned by private individuals, either as owners of the land or tenants.

The purpose of condemning the land described in the petition is for the City to rent or lease divers parcels of land to various tenants for the purpose of selling fresh fruits and vegetables.

No one ever contended that the general public in the Borough of the Bronx or elsewhere in the City of New York were ever in need of fresh fruit and vegetables.

The condemnation of the appellants' land is therefore in violation of their constitutional rights.

Panama Refinery v. *Ryan*, 293 U. S. 358;
United States v. *Certain Land*, 78 Federal Reporter (2d) 684;
Matter of Tuthill, 163 N. Y. 133;
The People ex rel. Herrick v. *Smith*, 21 N. Y. 595;
New York City Housing Authority v. *Muller*, 270 N. Y. 333.

Although in the case of *New York City Housing Authority v. Muller* (*supra*), the condemnation was for slum clearance, which all recognize is for improvement for health and social conditions, the Court sustained the acquisition of the land under eminent domain, but the Court of Appeals specifically stated by Crouch, J.:

> "Nothing is better settled than that the property of one individual, cannot, without his consent, be devoted to the private use of another even when there is an incidental or colorable benefit to the public."

Thus the taking of the appellants' property by the City and leasing it to a fruit or vegetable merchant so that he may make a profit therefrom is in direct violation of the Constitution of the State of New York and the Constitution of the United States.

And again in the *Matter of Tuthill* (*supra*), the Court of Appeals said by Gray, J.:

> "The State Constitution, from the beginning, by authorizing the appropriation of private property for public use, impliedly, declared that for any other use private property should not be taken from one and applied to the private use of another. (Matter of Albany Street, 11 Wend. 149.)"

> It was observed by Judge Denio in People v. Smith (21 N. Y. at p. 598), that it would not be due process of law to 'appropriate the property of one citizen for the use of another, or to confiscate the property of one person or, a class of persons, or a particular description of property upon some view of public policy, where it could not be said to be taken for a public use'."

The principle was forcibly stated in *United States v. Certain Lands* (*supra*), where the Court citing with approval *Panama Refining v. Ryan* (*supra*), stated:

> "We place our decision upon the second objection to the proceeding, viz., the lack of right in the gov-

ernment to exercise the power of eminent domain for the purposes contemplated by the act.

* * *

"The taking of one citizen's property for the purpose of improving it and selling or leasing it to another, or for the purpose of reducing unemployment, is not within the scope and power of the government."

While the appellants concede that it is fairly well settled that a citizen's land may be condemned for slum clearance purposes, it cannot be condemned and taken away from a citizen solely for the purpose of renting or leasing it to another citizen for commercial purposes, particularly where the appellants have pointed out in the answering affidavit that at the time of the filing of the petition for condemnation, they were negotiating with a certain oil company for the purpose of leasing their property for a gas station for the sale of gas and oil, and at the last moment the appellants were advised that inasmuch as the City was taking over the property, they would not have any further interest in leasing same (fols. 61 and 62).

Thus, the entry of the Orders of condemnation even violated the principle in the early case of *People* v. *Smith* (*supra*), where the Court of Appeals said by Denio, J.:

"In imposing a tax or in appropriating the property of a citizen, or a class of citizens, for a public purpose, with a proper provision for compensation, the legislative act is itself due process of law; though it would not be if it should undertake to appropriate the property of one citizen for the use of another, or to confiscate the property of one person or a class of persons, or a particular description of property upon some view of public policy, where it could not be said to be taken for a public use. (The People v. The Mayor of Brooklyn, 4 Comst., 419; Taylor v. Porter, 4 Hill, 140; Wynehamer v. The People, 3 Kern. 378.)"

In re Board of Transportation of New York, 272 N. Y. 52 is not in point as the property in that case was con-

demned for the extension of a railroad for the benefit of the public

Thus, it is manifest that the condemnation of appellants' property is merely for the purpose of leasing it to others for a rental which is in direct violation of the appellants' constitutional rights.

CONCLUSION

The application for a writ of certiorari should be granted.

Respectfully submitted,

SIDNEY S. LEVINE,
Attorney for Petitioners-Appellants

APPENDIX

Order Dismissing Appeal

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 17th day of January, 1961.

Present:

HON. BERNARD BOTEIN,
Presiding Justice,

CHARLES D. BREITEL,
JAMES B. M. McNALLY,
HAROLD A. STEVENS,
FRANCIS BERGAN,
Justices.

3154

In the Matter of the Application of The City of New York, relative to acquiring title to certain real property, where not heretofore acquired by the City, in the area bounded by Bronx River, East Bay Avenue, Halleck Street and Lafayette Avenue, in the Borough of the Bronx, City of New York, duly selected as a site for the New York City Terminal Market (Hunts Point Area, Bronx).

CITY OF NEW YORK,
Petitioner-Respondent,

vs.

MOSES DANIEL COHAN, HENRY I. COHAN and ESSIE M. COHAN,
Objectants-Appellants.

An appeal having been taken to this Court by the objectants-appellants from an order of the Supreme Court,

Per Curiam Decision of the Appellate Division Dismissing the Appeal

Bronx County, entered on the 22nd day of June, 1960, granting petitioner-respondent's petition to condemn certain real property known as Lot 170 of Block 2770 and Lot 232 of Block 2723, of Section #10 of the Tax Map of the City of New York, for the Borough of Bronx, and said appeal having been argued by Mr. Sidney S. Levine of counsel for the appellants, and by Mr. Milton H. Harris of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the appeal from the said order be and the same is hereby dismissed, with $20 costs and disbursements to respondent.

Enter:

VINCENT A. MASSI,
Clerk.

Per Curiam Decision of the Appellate Division Dismissing the Appeal

Appeal from order entered June 21, 1960, granting respondent's petition to condemn certain real property unanimously dismissed, with $20 costs and disbursements to petitioner-respondent. An appeal may not lie from an intermediate decree in a condemnation proceeding brought under the Administrative Code (N. Y. City Administrative Code, Sec. B15-25.0).

Order Denying Leave to Appeal to the Court of Appeals

STATE OF NEW YORK

IN

COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twentieth day of April A. D. 1961.

Present,

HON. CHARLES S. DESMOND,

Chief Judge, Presiding.

Mo. No. 260

In the Matter

of

The Application of The City of New York, relative to acquiring title to certain real property, where not heretofore acquired by the City, in the area bounded by Bronx River, East Bay Avenue, Halleck Street and Lafayette Avenue, in the Borough of the Bronx, City of New York, &c.

CITY OF NEW YORK,

Respondent,

vs.

MOSES DANIEL COHAN, HENRY I. COHAN and ESSIE M. COHAN,

Appellants.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part

Order Denying Leave to Appeal to the Court of Appeals

of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A copy.

RAYMOND J. CANNON
Clerk

(SEAL)

Supreme Court of the United States

OCTOBER TERM, 1960

No.

MOSES DANIEL COHAN, HENRY I. COHAN,
and ESSIE M. COHAN,

Petitioners,

against

CITY OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, The City of New York, for its statement in opposition to petitioners' application for a writ of certiorari, respectfully shows the following:

1. Statement of Issue

Petitioners seek review of an order granting the respondent's application for condemnation of real property. The order of condemnation, concededly, is not a final judgment and, we shall argue, is not within the scope of this Court's power to review.

2. Facts

This proceeding was brought in the Supreme Court of the State of New York to secure (1) condemnation of a site for the New York City Terminal Market, and (2) an assessment of damages for the property acquired (R. 6).

Petitioners herein opposed the application for condemnation on the ground that the proposed taking was not for public use because parts of the market area are to be rented to fruit and vegetable dealers and an automobile service station (R. 20-21). The Condemnation Court granted the application.

Petitioners then appealed to the Appellate Division of the New York Supreme Court. The appeal was dismissed for lack of jurisdiction, under our special condemnation statute, over an intermediate order in condemnation (Petition, Appendix, p. 12, reported in 12 A. D. 2d 745 [1st]). Thereafter, motions for leave to appeal to the Court of Appeals, the highest state court, were successively denied by the Appellate Division and the Court of Appeals.

In this Court, petitioners seek issuance of a writ of certiorari to the Court of Appeals of the State of New York. (Petitioners' misdescription of this application as one seeking issuance of a writ to the United States Court of Appeals for the Second Circuit was corrected by petitioners' letter to the Clerk of this Court, dated May 17, 1961).

ARGUMENT

Petitioners apply for a writ of certiorari to review an intermediate order in a state condemnation proceeding. The challenged order, a non-final determination, is not within the purview of the statute empowering this Court to grant a writ of certiorari.

(1)

This Court may issue a writ of certiorari for the review only of a final judgment or decree. 28 U.S.C. § 1257. The intermediate nature of the challenged order of condemna-

tion is beyond dispute. Petitioners' motion papers (p. 4) to the Court of Appeals conceded its non-final character. The restriction of certiorari to a final determination is based on a policy of rejecting "piecemeal litigation", and has been repeatedly upheld by this Court in condemnation proceedings. *Catlin* v. *United States*, 324 U. S. 229, 233 (1945). It is applicable alike to federal or state condemnation proceedings. Indeed, this Court has stated that it will not review an intermediate order in condemnation, even though it is appealable by right of local statute. *Ibid.* As noted, the special statute governing eminent domain in the City of New York bars review of intermediate orders.

(2)

Petitioners argue (Pet., pp. 8-9) to the issue of whether a terminal market serves a public purpose. Though this issue is premature, we note that the Special Term of our Supreme Court, in granting condemnation, observed that municipal use of land for a public market is supported by precedents in colonial charters given to our City, and by contemporary studies that document the need for a municipal wholesale produce terminal, strategically located and specially designed to serve the requirements of an off-mainland metropolis (R. 23-25). It is in such a situation as this, we submit, where this Court has expressed reluctance to interfere with the findings of local authorities and tribunals, made in response to indigenous conditions. *Clark* v. *Nash*, 198 U. S. 361, 368 (1905); *United States ex rel. T.V.A.* v. *Welch*, 327 U. S. 546, 552 (1946).

CONCLUSION

The petition for a writ of certiorari should be denied.

May 22, 1961.

Respectfully submitted,

LEO A. LARKIN,
Corporation Counsel,
Counsel for Respondent,
Municipal Building,
New York 7, N. Y.

SEYMOUR B. QUEL,
MILTON H. HARRIS,
Of Counsel.

Supreme Court of the United States

October Term, 1960

No. 993

MOSES DANIEL COHAN, HENRY I. COHAN, and ESSIE M. COHAN,

Petitioners,

against

CITY OF NEW YORK,

Respondent.

REPLY BRIEF

Statement

The full issue on this writ is whether or not the order condemning the petitioners' property is final in respect to the constitutional rights of the petitioners.

Argument

Under the 14th Amendment of the Constitution, no one can seize a person's property, even for a second, without due process of law. The order of condemnation, unlike the order in *Catlin* v. *U. S.*, 324 U. S. 229, directs the immediate seizure of petitioner's property. The order states in part as follows:

> "An application having heretofore been made for an order to condemn * * * real property, where not heretofore acquired * * * that title shall vest in the City of New York upon the entry of this order. * * *
>
> ORDERED, that the said application be and the same is hereby granted." (fols. 14-18)

This is a final order in all respects and as the undisputed facts in the petition and records in the State Courts show conclusively that the petitioners' property is condemned and seized in order to be leased to others so that the said lessees should make profits therefrom, is in direct violation of the 14th Amendment of the Constitution.

In the petition in *U. S. v. Certain Lands*, 78 Federal Report (2d) 684, the Court said:

> "'The taking of one citizen's property for the purpose of improving it and selling it or leasing it to another, or for the purpose of reducing unemployment, is not' within the scope and power of the government."

This being an unconstitutional act, a proviso for compensation is beside the point. THERE CAN BE NO CONSTITUTIONAL QUESTION ON THE VALUE OF PROPERTY ILLEGALLY SEIZED.

The condemnation and seizure of petitioners' property was, therefore, a final act, *Carondelet Canal and Navigation Co. v. State of Louisiana*, 233 U. S. 362, where the Court said, by McKenna, J.: (Suit was brought by the State of Louisiana against Carondelet Canal and Navigation Company to obtain a waterway for the transportation of freight and merchandise.)

> "We are met, however, at the outset by a motion to dismiss on the ground that the judgment is not final.
>
> "The judgment disposes of and orders the delivery of practically all the property sued for: (1) The waterway in its entirety. * * *. It reserved property not appurtenant to it and an accounting * * * that is, all was decreed that it was the purpose of the suit to have decreed and which not only constituted its success, but which involved and disposed of the Federal right asserted by the canal company. The judgment, therefore, has a substantial finality. * * *

> "The prohibition is directed against the exertion of sovereignty which the citizens, unless protected by organic law would be impotent to resist, whether boldly declared in an explicit law or disguised in an ambiguous form. This case is an illustration. Here is property sought to be taken from the canal company * * *. The motion to dismiss must, therefore, be denied * * *."

It is, therefore, manifest that there is no "piece meal" litigation on the issue and as pointed out by this Court, the mere reservation of accounting for compensation does not destroy the finality of the order of condemnation and seizure and certainly in granting of the writ of certiorari by this Court restoring the plaintiff's property would be final in all respects and nothing further would be left to litigation.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted

SIDNEY S. LEVINE,
Attorney for Petitioners.